

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
TERRENCE SAMPSON, : 19-cv-04946 (DG) (RER)
:
:
Plaintiff, :
:
- versus - : U.S. Courthouse
INTERNATIONAL UNION OF OPERATING : Brooklyn, New York
ENGINEERS LOCAL 14-14B, :
:
Defendant : May 26, 2022
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TRANSCRIPT OF CIVIL CAUSE FOR PRE-MOTION CONFERENCE
BEFORE THE HONORABLE RAMON E. REYES, JR.
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:
(VIA VIDEO/AUDIO)

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1 THE COURT: Good morning. This is Magistrate
2 Judge Reyes. We're holding a telephone pre-motion
3 conference in *Sampson v. International Union of Operating*
4 *Engineers Local 14-14B*, docket number 19-cv-4946.

5 Counsel for plaintiff, please state your name
6 for the record.

7 MR. O'NEILL: Good morning, your Honor. It's
8 Michael O'Neill for the plaintiff.

9 THE COURT: Counsel for the defendant?

10 MR. WILLIAMSON: Good morning, your Honor.
11 Andrew Williamson with FordHarrison here on behalf of the
12 defendant.

13 THE COURT: Good morning. So Mr. O'Neill, tell
14 me about the motion that you want to make.

15 MR. O'NEILL: Yes, your Honor. We want to
16 supplement the complaint. I submitted a proposed
17 supplemental complaint. I think that's substantially the
18 form that we would file it in. It's to simply bring
19 facts that occurred after the filing of the complaint
20 that are additional facts supporting the claims that were
21 alleged in the complaint. We would like to bring them
22 into the case. It was really precipitated when I asked
23 defendant to update their database with information. I
24 think when they produced it, they produced it through the
25 end of 2019. I asked them to give us updated data and

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1 they said it's not part of the case. So I thought that
2 it would be more expedient to supplement the complaint
3 than to have a discovery dispute on the issue. So that's
4 essentially what it is that plaintiff wants to do.

5 THE COURT: The data that was produced was
6 through the end of 2019?

7 MR. O'NEILL: Correct.

8 THE COURT: Even though the complaint was filed
9 the third quarter of 20 --

10 MR. O'NEILL: The third quarter of 2019.

11 THE COURT: Yes.

12 MR. O'NEILL: Yeah.

13 THE COURT: The complaint was filed August 29,
14 2019 that they produce data through the end of 2019,
15 correct?

16 MR. O'NEILL: That's my understanding.

17 THE COURT: Right. Mr. Williamson, what is the
18 problem?

19 MR. WILLIAMSON: Your Honor, our position is
20 really threefold here. The supplemental pleading would
21 be futile for a number of reasons. (Indiscernible)
22 completely changed (indiscernible) here which was
23 originally the client was referred to lower paying jobs
24 on lower paying machinery. Now it's that he worked less
25 hours since 2017. He still doesn't identify who, what,

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1 when, and where or how he was discriminated against, but
2 he's an African-American. He filed an EEOC charge in
3 2017. He's again working less hours barely two years
4 later in 2019.

5 So in our opinion, this wouldn't plausibly
6 plead claims of either retaliation or discrimination
7 (indiscernible) to a 12(b) (6) motion.

8 And also, the allegations are implausible on --

9 THE COURT: But Rule 15D says that -- are you
10 saying that the original pleading is defective or the
11 supplemental pleading?

12 MR. WILLIAMSON: Our opinion is that both are.

13 THE COURT: Yet you didn't move to dismiss?

14 MR. WILLIAMSON: Yes, that was a strategic
15 decision. And I will remark that at the original earlier
16 conference with the prior magistrate judge, the
17 magistrate judge even remarked and asked plaintiff at
18 that conference whether or not just pleading
19 (indiscernible) was enough. We did make a strategic
20 decision back then not to file a motion to dismiss.
21 Instead, that would have been dealt with on the motion
22 for summary judgment after the discovery period ended and
23 plaintiff had not yielded any -- or the discovery period
24 hadn't yielded any evidence to support the implausible
25 allegations.

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1 And just to add to my earlier point, your
2 Honor, the proposed supplemental pleading is implausible
3 on its face. He alleges that he worked 178 fewer hours
4 in 2020 than he did in 2019. Well during the COVID
5 pandemic, New York City Executive Order essentially shut
6 down the entire construction industry for approximately
7 three months which is a much more plausible explanation
8 for the de minimis reduction in hours than any
9 retaliation based on protected activity that occurred in
10 mid-2017 and resulted in the EEOC charge.

11 THE COURT: But isn't the question whether in
12 2020 he worked a few hours than white workers, white
13 union members, not whether he worked less hours than he
14 had previously worked? I mean that's the --

15 MR. WILLIAMSON: The way the proposed pleading
16 is framed, your Honor, is that his reduction in hours was
17 a result of retaliation by the union. And he tries to
18 try it to the EEOC complaint and made-2017 which I would
19 mention the proposed supplemental pleading doesn't
20 reference the amount of hours that the plaintiff worked
21 in 2018 but instead jumps all the way ahead to 2019. But
22 I'd even argue that he hasn't plausibly -- or he would
23 not be able to plausibly plead a causal connection
24 between the EEOC charge in 2017 and a de minimis
25 reduction in hours in 2019, a year and a half later.

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1 And in addition to the futility here of this
2 application, your Honor, plaintiff could have and should
3 have made or raised these allegation months, if not years
4 ago. He's referencing the amount of hours he worked
5 dating back to 2019. Plaintiff has known how many hours
6 he worked since 2019 and plaintiff's counsel has known
7 the latest and 2021 the number of hours that he worked in
8 2019. Despite that, he's waited until nearly a month
9 after fact discovery closed, which was extended a number
10 of times. And on the final extension, your Honor, it
11 explicitly provided in the order granting the extension
12 that no further extensions would be granted.

13 Despite all of that, Mr. O'Neill waited until
14 after fact discovery closed to make this application.
15 And I don't think there's a coincidence here that
16 plaintiff has filed this application just a handful of
17 days after his transcript was reviewed and errata sheet
18 was submitted that included material changes to his
19 testimony which precipitated our request to conduct a
20 further deposition of the plaintiff. And as far as
21 plaintiff --

22 THE COURT: (Indiscernible).

23 MR. WILLIAMSON: Sorry, your Honor.

24 THE COURT: Go ahead, Mr. Williamson, finish
25 up.

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1 MR. WILLIAMSON: I was going to say as far as
2 Mr. O'Neill's argument that this was precipitated by our
3 refusal to produce data beyond 2019, well he's had that
4 data since February of 2022. Despite that, he waited
5 until just a handful of days before the close of fact
6 discovery, 13 months later, to ask for further data. So
7 I don't think there could be a clearer example of undue
8 delay here.

9 THE COURT: Is it the defendant's position that
10 plaintiff can't assert any claims for anything that
11 happened after he filed the complaint?

12 MR. WILLIAMSON: Our position would be that his
13 recovery would be cut off in this action up until the
14 complaint based on the way the complaint is framed now.

15 THE COURT: Why did he produce data after the
16 date of the complaint? Data of the hours worked and
17 all --

18 MR. WILLIAMSON: Yeah, my under --

19 THE COURT: -- that after the date of the
20 complaint?

21 MR. WILLIAMSON: My understanding, your Honor,
22 is that's just the way the data is produced
23 electronically, it's by year. And I believe that was
24 also a part of some discussion between the attorneys in
25 this case and also the union's in-house counsel when

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1 there was extensive motion practice on the issue of
2 electronic data.

3 THE COURT: What would prohibit Mr. O'Neill
4 from filing a separate action on this claim?

5 MR. WILLIAMSON: We're not saying he couldn't,
6 your Honor. He could. But again, we would make the same
7 motion to dismiss there based on those allegations.
8 We're not saying here that he shouldn't be able to file a
9 motion or fully brief a motion in this proposed
10 supplemental complaint. It's just that our position
11 would be the same here as it would be in the new action
12 that those allegations, related claims would be futile
13 because they'd be subject to 12(b)(6) motions.

14 THE COURT: And yet your client made a
15 strategic decision not to file such a motion in this
16 case.

17 MR. WILLIAMSON: That's correct, at the start
18 of discovery, or prior to discovery.

19 THE COURT: All right. Mr. O'Neill, why don't
20 you just file a separate case and then have it related to
21 this one? You know, get --

22 MR. O'NEILL: Well yeah, I mean yeah, I suspect
23 if I did file a separate case in the eastern district
24 then the defendant would probably move to consolidate.
25 I'm just confused by defendant's position here a little

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1 bit. I've never known a defendant who prefers two
2 lawsuits over one. It certainly would make settling a
3 case more difficult because they would want a general
4 release and we'd have a separate case out there.

5 But if that's what defendants want, then I
6 guess that's what they can have.

7 MR. WILLIAMSON: Just to clarify again, our
8 desire isn't to litigate two cases. We think plaintiff
9 should be able to file his motion in this case and we'll
10 just oppose it, make the same argument that we would and
11 it would be decided here.

12 THE COURT: But that wouldn't preclude him,
13 even if you would win that motion, that wouldn't preclude
14 him from the next day filing another case.

15 MR. WILLIAMSON: That's correct.

16 THE COURT: This is only whether he can -- this
17 motion is only whether he can file a supplemental
18 complaint. It wouldn't be with prejudice to the claim.
19 So --

20 MR. WILLIAMSON: The other thing I would note
21 with the issue with him filing a new action, a new claim,
22 that he's going to try to assert presumably Title 7 and
23 other claims that are going to be time barred. And one
24 other thing here is that the underlying EEOC charge here,
25 Mr. O'Neill, or plaintiff rather, did not raise a

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1 retaliation claim. And so that's something else that
2 would be dealt with on a motion for summary judgment
3 here. And his failure to exhaust is something that's
4 included in our answer here. The failure to exhaust is
5 (indiscernible).

6 THE COURT: Why don't you, Mr. O'Neill, why
7 don't you file a full blown motion and I'll have you
8 folks confer on a briefing schedule for it. Or if you
9 think it's more expeditious, Mr. O'Neill, go ahead and
10 file another action and seek to have it consolidated with
11 this one. That will at least save you the headache of
12 filing a motion.

13 MR. O'NEILL: Yeah. Okay. That's fine. One
14 or the other or I suppose neither. But we'll -- well, I
15 don't want to be too coy here. I mean well I don't know
16 whether there would be -- I mean there would probably be
17 some federal jurisdiction on a standalone complaint based
18 on events occurring after we filed the first complaint.
19 But it's also possible that plaintiff would want to bring
20 that in state court. So if we bring a separate action,
21 it may not be in the federal court.

22 THE COURT: Or maybe they'll remove it somehow.

23 MR. O'NEILL: Well, if it has federal claims,
24 they could do that.

25 THE COURT: All right. Look --

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1 MR. O'NEILL: But anyway, that's something for
2 the plaintiff to decide and we'll talk it over with him.

3 THE COURT: Why don't you think about it? He
4 And if you are going to file a motion to supplement with
5 a brief and all of that, I would like to know what the
6 briefing schedule is going to be. No later than -- I'll
7 give you till June 3rd.

8 MR. O'NEILL: Okay.

9 THE COURT: You'll make a decision over the
10 next week, meet and confer with Mr. Williamson and tell
11 me what the briefing schedule is going to be. I'm
12 uncomfortable making a decision on these letters.

13 MR. O'NEILL: Sure.

14 THE COURT: All right?

15 MR. O'NEILL: A couple of housekeeping items,
16 your Honor, if I may?

17 THE COURT: Sure.

18 MR. O'NEILL: As Mr. Williamson mentioned,
19 we've agreed to produce plaintiff to answer any questions
20 they have about the corrections he made in the
21 transcript. So I have no objection to that. I just want
22 the Court to be aware that we will be doing that.

23 Defendant has not produced a 30(b) (6) witness
24 for one of the categories which was to explain some of
25 the finer points of its computer system and database, and

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1 they have not agreed to produce a witness. So I don't
2 know if we can deal with that today or if you want
3 separate letters on that.

4 And then I take it we'll be holding the expert
5 disclosure discovery in abeyance until the supplemental
6 complaint issue is resolved?

7 THE COURT: Yes. What about the 30(b) (6)
8 witness, I guess additional 30(b) (6) witness, Mr.
9 Williamson?

10 MR. WILLIAMSON: So as part of planning the
11 30(b) (6) notice there were a number of topics listed
12 obviously and one of them dealt with really the specifics
13 are more of a technological aspect of the union's
14 Referral Hall data or Referral Hall processes. We told
15 Mr. O'Neill that the union doesn't have anyone in house
16 who maintains or otherwise has knowledge of the technical
17 side of it. We've identified the outside vendor who
18 handles that. We've even offered to facilitate service
19 of a subpoena on that entity to help Mr. O'Neill conduct
20 a deposition of that entity and we stand ready to do that
21 moving forward also.

22 THE COURT: Mr. O'Neill, why is that not a
23 problem? Why is that a problem?

24 MR. O'NEILL: Well, is not necessarily a
25 problem. If defendant is agreeable to us doing it that

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1 way, I'll do it that way.

2 MR. WILLIAMSON: Yeah, that's what we --

3 MR. O'NEILL: I mean it's their database. And
4 I am certain that if they wanted this information, they
5 could get it if they haven't already got it. And I don't
6 think it should be our requirement to chase down somebody
7 for information that they have control over, but I'm
8 willing to do it that way if that's --

9 THE COURT: Well I mean the alternative is that
10 they get someone to confer with whoever from that company
11 to get up to speed on it. But I'm sure if they did that,
12 there would be questions that you would ask that that
13 additional 30(b)(6) witness won't be able to answer
14 because they're not the master of the computer program.
15 They just don't know. They get an outside vendor to
16 prepare a computer system for them and they say here's
17 how you put in the data and a 30(b)(6) witness is not
18 going to know enough even if they --

19 MR. O'NEILL: Yeah, I understand. I just think
20 that they control this witness, that they could -- they
21 haven't said that the person that they use won't testify,
22 they've asked him to and he's refused. They just tell me
23 I got to go get him. But you know, I'll do it their way.
24 I --

25 MR. WILLIAMSON: That's not what we told

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1 plaintiff's counsel. We've offered from the outset after
2 we identified this is the outside entity that does it.
3 If Mr. O'Neill -- it shouldn't take long to prepare a
4 subpoena. We will facilitate service and have them
5 appear. We can't make a third party appear at a
6 deposition.

7 THE COURT: No, but you can ask.

8 MR. O'NEILL: I'll do it that way, your Honor.

9 THE COURT: Mr. O'Neill, prepare the subpoena
10 and work with Mr. Williamson to have it served. And if
11 you have a problem getting that person, then you'll let
12 me know and we'll deal with that.

13 MR. O'NEILL: Okay. Fair enough. All right.
14 Well that's all plaintiff has for today.

15 THE COURT: Okay. All right. Thank you,
16 gentlemen.

17 MR. WILLIAMSON: Thank you, your Honor.

18 MR. O'NEILL: Thank you, your Honor.

19 (Matter concluded)

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C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 2nd day of August, 2022.

Mary Greco
Transcriptions Plus II, Inc.